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In the

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. Is a content-neutral ordinance that requires a permit for core political speech in a traditional public forum analyzed as a prior restraint or under the more deferential standard applicable to time, place and manner regulations?

II. May a plaintiff bring a facial challenge to a permit ordinance which restricts political speech in a public forum without first having to prove that the ordinance has been unconstitutionally applied to him because of the government's hostility to the plaintiff or his proposed speech?

III. Must an ordinance requiring a permit for core political speech in a traditional public forum include each of the procedural safeguards established in *Freedman v. Maryland*, or is that case only applicable to sexually explicit speech presented by adult entertainment businesses?

IV. Does immediate access to the courts following a denial of a permit for core political speech in a traditional public forum constitute prompt judicial review, as required by *Freedman v. Maryland*, when there is no requirement for a prompt judicial decision?

V. Can an ordinance requiring a permit for core political speech in a traditional public forum include unfettered discretion to issue or withhold permits?

PARTIES TO THE ACTION BELOW

The original plaintiff in this case was Robert MacDonald, who died while the case was pending in the United States Court of Appeals for the Seventh Circuit. Caren Cronk Thomas and Windy City Hemp Development Board, Inc. were allowed to substitute as appellants in the Circuit Court. The Chicago Park District was the only defendant and appellee below.

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OPINIONS BELOW

The unpublished opinion of the United States District Court for the Northern District of Illinois, entered on March 29, 1999, is reproduced in the Appendix to the Petition for Writ of Certiorari (Pet. 75a). The opinion of the United States Court of Appeals for the Seventh Circuit is also reproduced in the Appendix to the Petition (Pet. 1a).

JURISDICTION

The Petition was taken to review a decision of a United States Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATUTES AND ORDINANCES

The pertinent provisions of the Chicago Park District Ordinance, both in the form it existed when this suit was filed and as subsequently amended, are reproduced in the Joint Appendix (J.A. 59, 103).

STATEMENT OF THE CASE

Introduction

This is a facial challenge to an ordinance requiring all persons who would engage in core political speech in the public parks of the City of Chicago to obtain a permit before uttering a word. The General Superintendent of the Chicago Park District has been granted the authority to issue or deny permits for group activities in the parks–including political rallies–in his unfettered discretion. The ordinance is a prior restraint on activities that this Court has described as "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), and should contain each of the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965). Three of those safeguards–prompt judicial review of a permit denial, the burden of the government to initiate that review and then prove why the permit should not be granted–are not included within the ordinance.

The Seventh Circuit rejected this Court's binding precedent when it upheld the ordinance against all constitutional challenges. Because the General Superintendent has unlimited discretion to deny permits for political reasons, and the lack of *Freedman*'s procedural safeguards, the ordinance is unconstitutional under the First Amendment.

Facts

The Speaker: Robert MacDonald and the Ad Hoc Coalition for Drug Law Reform

Petitioners' predecessor, Robert MacDonald, was a grass-roots political activist involved in campaigns for drug policy reform.[1] He organized and led marches through city streets and held rallies in the parks, advocating his positions on these issues of great public interest. In 1997 he was denied a permit to conduct a march through the streets of Chicago on behalf of the Ad Hoc Coalition For Drug Law Reform.[2] The march was to culminate in a political rally in Grant Park. He was denied a permit for the rally as well. These denials were the first in a long series of difficulties MacDonald and his associates have had in obtaining government permission to engage in core political speech in traditional public fora in Chicago.

The Chicago Park District and its Code

The Chicago Park District ("Park District"), a body politic under Illinois law, has enacted the Park District Code ("Code").[3] The Code regulates all activities in the City's parks, including political rallies involving core political speech. The Code requires, among many other things, that anyone wishing

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1. In this brief the Appendices to the Petition for Writ of Certiorari are cited as "Pet. ___." The Joint Appendix is cited as "J.A. ___."

2. MacDonald's Petition for Writ of Certiorari in the related challenge to Chicago's parade permit ordinance has been filed. *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), *pet. for cert. pending* (Docket No. 00-1839).

3. The Park District has authorized its General Superintendent to enact "reasonable rules and regulations" to flesh out the Code's provisions, but apparently he has not done so (Code § C.2.; J.A. 62).

to speak in any city park with a group involving more than fifty individuals, or with a group of *any* size utilizing amplified sound, must first seek the Park District's permission by filing a written application for a permit (Code § C.3.a. (1), (6); C.4.a.; J.A. 63-65).[4] The applicant must pay an application fee, security deposit and user fee, execute an indemnification and reimbursement agreement, and obtain insurance coverage (Code § C.4.b.-f.; J.A. 64-69).[5] The Code provides that the Park District "may" waive "[a]ny requirements for use fees, deposits, proof of insurance or premium for insurance" if its General Counsel decides that the proposed "activity is protected by the First Amendment and the fees would be so financially burdensome as to preclude the applicant from using Park District Property for the proposed activity." (Code § C.6.c.; J.A. 75).

The Park District must send a written response to each application within fourteen days, but can unilaterally extend this review period for another fourteen days, apparently for

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4. The City of Chicago is not bound by the Code, but has an agreement with the Park District covering various events, including the Taste of Chicago, the Chicago Blues Fest, the Chicago Gospel Fest, and the then-Champion Chicago Bulls' celebration. (Transcript of Proceedings held before Magistrate Judge Keys on July 21, 1997, filed as item 61 in the district court on September 8, 1997, at 68-70, 94) (hereinafter "7/21/Tr. at ____.") The Park District also exempts itself from its Code requirements, and gets first pick on the dates it wants for its events, such as concerts by the Grant Park Symphony. *Id.* at 70-71.

5. The fees can be staggering for anyone without a great deal of money, especially when the event will not generate funds. One can expect to be charged many thousands of dollars each day under the Code's requirements.

any reason (Code § C.5.c.; J.A. 70).[6] The Park District "may" deny a permit application based upon any one or more of thirteen enumerated grounds, including:

> (2) the application for permit is not fully completed and executed; . . .
>
> (3) the application for permit contains a material falsehood or misrepresentation;
>
> (4) the applicant is legally incompetent to contract or to sue or be sued;
>
> (5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District; . . .
>
> (7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place; . . .
>
> (9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public; . . .
>
> (12) the applicant has not secured the requisite insurance; or
>
> (13) the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or

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6. An applicant may not receive notice of a permit denial until the very day of the planned event. (7/21/97 Tr. at 64).

has violated the terms of prior permits issued to the applicant.

(Code §C.5.e.; J.A. 71-73).

Under Subsection (13) the Park District can deny an application if it decides that the applicant has violated the terms of a prior permit–without a hearing and without even disclosing what "evidence" it considered. The Park District can also subject a permittee to civil fines of up to $500 for each day a permit violation continues. (Code § C.7.; J.A. 75).

If an application is denied, the applicant can file a "written appeal" to the General Superintendent within seven days (Code § C.6.a. (1); J.A. 74). The Code does not provide for a hearing where the applicant can present testimony or respond to any purported reasons for denial of a permit at any stage of the process. (Code § C.6.; J.A. 73-74).[7] The General Superintendent has seven days from receipt of the appeal to notify the applicant whether the denial is affirmed, modified or reversed. (Code § C.6.a. (2); J.A. 74).

The Park District Denies MacDonald and His Coalition Permission to Speak

On March 5, 1997, MacDonald filed a permit application on behalf of the Ad Hoc Coalition for Drug Law Reform, seeking to hold a rally in Grant Park on May 10 and 11, 1997. (J.A. 77-78). He simultaneously filed the Park District's form "Affidavit in Support of First Amendment Claim for Waiver of Park District Insurance Requirement or Fee," verifying that the planned rally was to be "based on the theme of [d]rug [p]olicy [r]eform" and was protected by the First

7. *See also* the Transcript of Proceedings held before Magistrate Judge Keys on May 6, 1997, filed as item 61 in the district court on September 8, 1997, at 38-39, 76 (hereinafter "5/6/97 Tr. at _.").

Amendment. (J.A. 79-80). MacDonald also swore that the Coalition had "no money," and that the insurance and user fee requirements were so financially burdensome that they would preclude the Coalition from conducting the rally. (J.A. 79-80).

By letter dated March 12, 1997, Park District General Counsel Joan Fencik advised MacDonald that his application had been denied, for three reasons. (J.A. 81-83).[8] First, she claimed that MacDonald had violated, "in multiple respects," the terms of permits for events held in 1996, and had "misrepresented the nature and scope of [his] intended activities" in connection with those prior events. (J.A. 81). Second, she said that the current application was "incomplete or incorrect" in that he had stated in the application that the Coalition was a not-for-profit organization, but he did not "attach a current verification of section 501(c)(3) status." (J.A. 81-82). Finally, she said the Coalition was not legally competent to contract and was not a proper applicant. (J.A. 82). Fencik testified that had she granted his permit application, she would have rejected his First Amendment claim for waiver of the insurance requirement and other fees "based on last year's experience," claiming that she "would need a more detailed explanation of the purpose of the rally and what First Amendment rights are impacted."(J.A. 82).[9]

On March 18, 1997, MacDonald filed his letter-appeal with the General Superintendent, specifically refuting each of

8. Fencik testified that she does not "normally get involved in every permit application" filed with the Park District. (5/6/97 Tr. at 101). But she took a particularly hands-on approach with MacDonald's permit applications. (7/21/97 Tr. at 13, 66; Def. Ex. 6).

9. Fencik, who said she determines whether the various fees are sufficiently burdensome for an applicant to justify a waiver, could not articulate any standards governing her decision; she sets her own criteria. (5/6/97 Tr. at 90-93).

the three grounds given for denial of his application. (J.A. 84-88). He also filed an amended application in his own name to cure Fencik's allegation that the Coalition was not legally competent to contract. (J.A. 87).

On March 24, 1997, the General Superintendent advised MacDonald that his appeal was denied. (J.A. 89-95). He not only affirmed Fencik's conclusions, but claimed "further investigation" had disclosed a panoply of other alleged violations of the 1996 permits, including individuals consuming alcohol and remaining in the park after hours. (J.A. 91).[10] He concluded that the alleged violations of the 1996 permit disqualified MacDonald from receiving a permit, regardless of "whether the applicant is your ad hoc committee [sic], you individually, or any other applicant who submits an application on your behalf." (J.A. 94). Furthermore, that ban was indefinite in duration: "Until the previous violations and misrepresentations are fully addressed and resolved, the Park District will deny you a permit." (J.A. 94).[11]

MacDonald's request for a First Amendment waiver of the insurance requirement and various fees was also rejected, again based upon the alleged 1996 permit violations. The

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10. Fencik testified that the permit holder is strictly liable for any violations of a permit by anyone, regardless of any ability to control such conduct, and that the Code allows the denial of an application even where others totally unrelated to that holder violated conditions attached to a previous permit. (5/6/97 Tr. at 93-97).

11. No Park District official or employee has ever explained how these alleged violations are to be "fully addressed and resolved." The Park District withheld MacDonald's security deposit in 1996, but never assessed any fines against him – the only way to "address and resolve" those issues under the Code (Code § C.7.; J.A. at 75). The Code makes no provision for any hearing to address and resolve allegations, either when they are made or at a later date. (5/6/97 Tr. at 38-39, 76).

General Superintendent advised MacDonald that even if his permit were granted, the Park District would require a user fee of $8,000 for each day of his event, payable no later than 30 days in advance, a security deposit of $2,500, and a certificate of insurance for $1,000,000. (J.A. 94-95). He concluded by re-emphasizing the lifetime ban that prohibited MacDonald from speaking in the Chicago parks: "the permit applications state unequivocally that 'violation of the terms of this permit shall be grounds for denial of all future permit applications.' The Park District Code contains this same provision." (J.A. 95).[12]

MacDonald quickly filed an amended appeal, stating that "I was not present in [the park] for the violations [during 1996] which Ms. Fencik alleges, . . . [a]ll of my activities in [the park] ended well before the park closed, and I did not encourage anyone to stay in the park after that time." (J.A. 99). On March 26, 1997 the General Superintendent summarily denied the appeal stating, "you were the permittee on the [1996] permit, and were responsible for ensuring that all requirements of the permit were met. Your failure to be on site to supervise your own event does not excuse the permit violations." (J.A. 102).

The Administrative Record

In his March 24, 1997 letter to MacDonald rejecting his appeal, the General Superintendent stated that he had considered the following: MacDonald's permit application; Fencik's letter denying his application; MacDonald's written appeal, including attachments; MacDonald's "prior applications;" unspecified "other documents relating to the

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12. Fencik confirmed that the Code allows the Park District to ban speech based on alleged violations of previous permits. (5/6/97 Tr. at 93).

prior events;" and "I have also spoken with Joan Fencik about the circumstances surrounding your application and the prior events." (J.A. 89-90). MacDonald was not privy to those conversations, which were not memorialized in any way or otherwise made part of any record.

MacDonald Seeks a Lawyer and Relief From the Courts

Upon receiving the rejection of his amended appeal, MacDonald immediately sought legal counsel, speaking to three or four lawyers, none of whom would agree to take his case *pro bono*. (5/6/97 Tr. at 35, 36). After a month of searching, less than two weeks before his planned event, he was finally able to obtain counsel. *Id.* at 36-37, 45. Rather than seeking the more cumbersome common law *certiorari* review remedy in the Illinois state courts, MacDonald filed this action in the district court on April 29, 1997, bringing a facial attack against the Code. (J.A. 47). He immediately sought preliminary injunctive relief. That motion was denied because the court concluded that there was insufficient time to conduct orderly proceedings prior to the scheduled date for MacDonald's event.[13]

MacDonald then filed a second application for a preliminary injunction, for a rally to be held in August, 1997. This time, after a full evidentiary hearing, Magistrate Judge Keys granted the preliminary injunction. MacDonald held his rally.[14]

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13. Given the pending litigation MacDonald was allowed to hold a severely curtailed rally without a permit, but was not allowed to use stages or sound amplification equipment except for a hand-held bullhorn.

14. The Seventh Circuit later vacated the preliminary injunction. (continued...)

In April, 1998 the magistrate judge recommended that the parties' cross motions for summary judgment on MacDonald's facial challenge be denied because the record was insufficiently developed as to whether the Park District had a well-established historical practice of constitutional construction and application of its Code. (Pet. 14a). On March 8, 1999, after the parties engaged in discovery on that issue,[15] the magistrate judge issued an amended Report and Recommendation, recommending that MacDonald's motion for summary judgment on the facial attack be granted in part, and that the Park District's motion be denied. (Pet. 55a). On March 29, 1999, the District Court rejected the Report and Recommendation, denied MacDonald's motion for summary judgment, granted the Park District's motion, and entered judgment in favor of the Park District. (Pet. 75a). The Seventh Circuit affirmed, 227 F.3d 921 (Pet. 1a), and this Court granted *certiorari*.

SUMMARY OF THE ARGUMENT

The Court of Appeal's opinion included holdings so in conflict with this Court's many pronouncements on the value of core political speech and the protection it must be accorded that it cannot be allowed to stand. First Amendment jurisprudence has been turned on its ear in the Seventh Circuit. Unless that decision is reversed, political speakers whose message may be at odds with the current bureaucratic "party line" will face so many obstacles that many will be silenced. Core political speech, "the lifeblood of a self-governing

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14. (...continued)
MacDonald v. Chicago Park District, 132 F.3d 355 (7th Cir. 1997).

15. The Park District refused to cooperate in this discovery, which resulted in a finding by the district court that there was no saving historical practice of the Park District. (Pet. 62a-63a, 86a).

people,"[16] will be facing its greatest threats since the dark days of McCarthyism and its "ideological cleansing."

The first glaring error of the Court of Appeals was in its holding that an ordinance requiring a permit to engage in political speech in a public park is not a prior restraint, so long as it is content-neutral. That is an obviously incorrect statement of law, as this Court has repeatedly used prior restraint analysis in reviewing content-neutral licensing schemes. The panel rationalized its position by suggesting that political speech faces no threat of censorship, unlike cases involving adult entertainment, which the panel said was more needful of First Amendment protection than political speech.

The panel's position, of course, is ludicrous. No court in America has *ever* held that core political speech is less likely to be censored, and less in need of protection, than topless dancing and sexually explicit videos. Other than the Seventh Circuit, no court is likely to do so.

Next, the panel decreed that facial challenges should not be entertained in First Amendment cases without proof that the law has been applied in an unconstitutional manner. Again, this position is so contrary to this Court's many pronouncements that it must be rejected out of hand.

Once this Court determines that the Chicago Park District ordinance is a prior restraint and is subject to a facial challenge, the Court must then answer three questions: (1) must the ordinance provide all three procedural safeguards mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965); (2) what is meant by "prompt judicial review;" and (3) does the ordinance contain unfettered discretion.

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16. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 2001 WL 703912 (June 25, 2001) (Thomas, J., dissenting).

Freedman requires that a permit ordinance include a guarantee of prompt judicial review if a permit is denied, and a requirement that the government initiate that review. The Park District ordinance contains neither, but the Court of Appeals found that satisfactory because (a) a time, place and manner restriction (which the panel found the ordinance to be) need not include *Freedman*'s protections; and (b) Illinois' system of review through common-law certiorari is sufficient to protect any constitutional rights which may be abridged.

The panel was wrong in both regards. As this Court found the Dallas ordinance to be a prior restraint in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), so it must find this ordinance to be a prior restraint. All of *Freedman*'s procedural safeguards must apply to any restriction upon the use of public fora for their historically recognized purpose of discourse and communication. And a system where the unsuccessful permit applicant must seek judicial review and bear the burden of proving a wrongful denial, confined to a record that includes almost nothing of use to a reviewing court, faced with a presumption of correctness, and forced to wait indefinitely with no time constraints whatsoever, does not begin to meet First Amendment requirements.

There is one further assault upon free speech which must be corrected. The Seventh Circuit recognized that the ordinance contained enough discretion to present the danger of censorship, allowing the Park District to grant permits to its friends and deny them to its enemies. But the panel said this was permissible, because at least *popular* speech would not be suppressed, only *unpopular* speech.

This last position may be the most untenable of all. When a "little" discretion, used against unpopular speakers, is allowed by the courts of America, the Congress and the several states might as well amend the Constitution and remove the

Free Speech Clause. Speech will be free only for the majority.

ARGUMENT

The political movement challenging the government's policy of criminalizing and incarcerating those who use "illegal" drugs – especially marijuana – rather than concentrating on treatment, rehabilitation and education, grows stronger daily. Political activists demonstrating in the streets and parks of our cities, holding political rallies to galvanize support for their message that the war on drugs has failed and must end, are a strong component of that movement.[17] In many cities they are confronted by a government strongly opposed to their message.[18] By denying permits for the use of the streets and parks, governmental units have been able to mute this message.[19]

Since 1997, Chicago officials have repeatedly refused to grant permits for events designed to deliver this message. Petitioners and others have had to fight for the right to engage in core political speech virtually every time they attempted to hold a demonstration or parade.

The Chicago Park District has used its permit ordinance

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17. Because the federal government spends almost eighteen billion dollars *a year*, and the states another eighteen billion dollars annually, powerful special interests – like the Drug Enforcement Administration – have defended the failed government policies vigorously.

18. For example, Mayor Guiliani's administration in New York City has made it very difficult for *any* political message with which he disagrees to gain access to a public forum. *MacDonald v. Safir*, 206 F.3d 183, 191 n.4 (2nd Cir. 2000).

19. One need only compare the rallies in Boston – where permits are easy to obtain and 40,000 - 50,000 people turn out – to rallies in New York and Chicago – where permits are nearly impossible to get and the size of rallies has dwindled to a few thousand.

to make it as difficult as possible for activists to deliver their message to the public. We ask this Court to reiterate to the Chicago Park District and every government which would suppress public political speech on any subject, that ordinances like the Park District's Code are unconstitutional prior restraints which will not be tolerated. Only if this Court makes a ringing pronouncement that the First Amendment has lost none of its vitality will Petitioners and others – in Chicago, New York and every city and county in America – be able to actually exercise the cherished right of free speech, a right that we have consistently "marched our sons and daughters off to war to preserve." *Young v. American Mini Theatres, Inc., 427* U.S. 50, 70 (1976) (plurality opinion).

I. A PERMIT REQUIREMENT IMPOSED ON CORE POLITICAL SPEECH IN A PUBLIC FORUM MUST BE ANALYZED AS A PRIOR RESTRAINT.

While everyone is aware of the serious conflict among the circuits on the issue of prompt judicial review, there is a more basic question which must be answered first: is a content-neutral permit ordinance restricting political speech in a public forum a prior restraint?

A. Core political speech enjoys heightened protection under the First Amendment.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *McIntyre v Ohio Elections Commission*, 514 U.S. 334, 346 (1995). A major purpose of the First Amendment was to protect political discussion of such issues. *Id.* This reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Political rallies and parades are "core political speech," entitled to the highest degree of protection the First Amendment affords. They are "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), occupying the "highest rung of the hierarchy of First Amendment values," entitling it to special protection. *Connick v. Myers*, 461 U.S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). As Justice Thomas stated in dissent in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 410-11 (2000), "Political speech is the primary object of First Amendment protection." It is "the lifeblood of a self-governing people." *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 2001 WL 703912 (June 25, 2001) (Thomas, J., dissenting).

While on the one hand stating that there is no censorship of political speech in Chicago, the Seventh Circuit acknowledged that "the advocates of legalizing the sale of marijuana . . . have very few political friends." (Pet. 4a). Unpopular messages are always susceptible to governmental suppression, and require a more vigilant federal judiciary to protect them. "[E]xpression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411 (1989).

Petitioners' activities deserve much more than the short shrift afforded them by the Seventh Circuit. They deserve the strongest protection the First Amendment provides, particularly in the forum in which they were to take place - a public park.

B. Chicago's public parks are the quintessential public fora.

Adding to the special protection for Petitioners' expressive activities is the fact that they were to take place in Grant Park, famous in Chicago for political rallies and demonstrations. Public parks, like streets and sidewalks, are the quintessential public fora, having been used for assembly and public disputation and colloquy from time immemorial. Regardless of who "owns" the parks, they are held in trust, not only for recreation but of at least equal importance, for "assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). While recreational activities are certainly a desirable part of societal life, the right to free speech must not be subjugated to the protection of frisbee-tossing, sunbathing, volleyball, or even baseball. Every one of us has the constitutional right to use parks for peaceful demonstrations and rallies, to air political views and complaints. *American Federation of Labor v. Swing*, 312 U.S. 321, 325 (1941). Use of the public ways for such demonstrations is an exercise of constitutional rights "in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Schemes that deny citizens these rights have been routinely and roundly condemned. *Kunz v. New York*, 340 U.S. 290, 294 (1951).

C. There is no historical support for the Seventh Circuit's conclusion that only content-based restrictions are considered prior restraints

The Court of Appeals concluded that only ordinances explicitly authorizing censorship of content are to be treated as prior restraints: "The regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity . . . ." (Pet. 3a). But history has

taught us that such decisions are often made in secret, with the reason publicly given for denial of the right to speak having nothing to do with the real basis for the action. [20]

Even if we return to Blackstone (as the Seventh Circuit felt compelled to do in order to find some support for its aberrant position) we see that the Seventh Circuit has strayed.[21] As long ago as the first half of the last century, we find this Court holding that an ordinance prohibiting the distribution of "circulars, handbooks, advertising, or literature of any kind" without a permit was an unconstitutional prior restraint, expressly noting that the ordinance did not allow the consideration of content. *Lovell v. Griffin*, 303 U.S. 444 (1938). More recently, in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) the Court invalidated a parade permit ordinance as an unlawful prior restraint, even though it did not authorize censorship.[22] Even more recently, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), six Justices of this Court said a Dallas ordinance requiring all sexually oriented businesses to obtain a license before operating was a prior restraint, even though it did not authorize consideration of content in the license decision-making process.

The Seventh Circuit ignored these precedents, asserting that license schemes regulating sexually oriented businesses require "greater judicial vigilance" than those restricting

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20. The only pertinent inquiry is whether censorship is a realistic result of the scheme, not whether it is expressly authorized. *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750 (1988).

21. "The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no previous restraints upon publications . . . ." 4 W. Blackstone, Commentaries, 151-52.

22. There is no material difference between the *Shuttlesworth* ordinance and the Chicago Park District ordinance.

political speech, despite having previously recognized the unpopularity of Petitioners' message. (Pet. 11a). Since there is little chance of censorship of political speech, said the Seventh Circuit, it is unnecessary to treat licensing schemes such as the Park District's as a prior restraint.[23]

This Court never intended to allow core political speech to be so easily stripped of the First Amendment's protective mantle. If the Seventh Circuit's approach was the law of the land, one engaged in sexually oriented speech–described in *City of Erie v. Pap's A.M., Inc.*, 529 U.S. 277, 289 (2000), as speech at the outer perimeter of First Amendment protection–would receive more protection from prior restraints than one engaged in core political speech. Such a position is First Amendment blasphemy.

The Court of Appeals' insistence that no restraint is a prior restraint unless it is based upon the government's overt disapproval of the message is illogical and irrational, upon both experiential, as well as doctrinal grounds. It is in direct contrast to the pronouncements of at least six Justices of this Court in *FW/PBS*, 493 U.S. at 222-23.[24] The Park District

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23. Contrary to the strange comment of the Seventh Circuit that political speech needs little protection because it is not subject to the kind of suppression visited upon sexually explicit speech, history demonstrates that governmental attempts to suppress unpopular political speech remains virtually a daily occurrence. The observation that those seeking to engage in unpopular political speech in Chicago have little reason to fear governmental attempts to suppress their activities is particularly astonishing, coming from the same court (indeed, the same judge) that branded Chicago the political "censorship capital of the United States." *Nelson v. Streeter*, 16 F. 3d 145, 147 (7th Cir. 1994).

24. Justices Stevens and Kennedy joined the plurality, authored by Justice O'Connor. Justices Brennan, Marshall and Blackmun, in a

(continued...)

ordinance restricts the most valuable speech the First Amendment recognizes. It must be rejected in the most forceful terms, to deter even the *possibility* of government suppression of our most valuable resource-the arguments and discourse of our citizens.

D. The Chicago Park District permit ordinance is a prior restraint, and is presumed to be unconstitutional.

The Seventh Circuit failed to follow basic constitutional precepts developed over the past century by this Court when it held that the Park District permit ordinance is not a prior restraint. The panel found this Court's First Amendment jurisprudence, painstakingly constructed over the past century, not to be "a helpful formula." (Pet. 3a). The panel ignored this Court's numerous pronouncements regarding the use of public parks in holding that since the real purpose of parks is recreation, not "political and ideological agitation," a regulation restricting speech cannot be analyzed in the abstract, as doing so "invites semantic nitpicking and judicial usurpation of the legislative drafting function . . . ." (Pet. 4a-5a). Blatantly contradicting this Court's numerous holdings to the contrary, the panel found there "is reason to doubt that [prior restraint analysis] can provide much assistance to judges . . . ." (Pet. 4a). The Seventh Circuit's application of the time, place and manner test to the Park District Ordinance is simply illegitimate.

This Court has steadfastly reiterated, in a plethora of contexts, that any scheme which allows a governmental entity

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24. (...continued)
concurring opinion, left no doubt that the ordinance was a prior restraint. Therefore, six justices of this Court concluded that Dallas' *content-neutral* licensing regulation, requiring a business to obtain city permission before engaging in free speech, was a prior restraint.

to deny the use of a public forum in advance of actual expression is a prior restraint. The rule has been applied to every character of public activity, including solicitation of religious donations, *Cantwell v. State of Connecticut*, 310 U.S. 296, 306 (1940); parades, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); religious worship services, *Kunz v. New York*, 340 U.S. 290, 293 (1951), *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); solicitation of union membership, *Staub v City of Baxley*, 355 U.S. 313, 321 (1958); exhibiting movies, *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 140-41 (1968); distribution of pamphlets, *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); solicitation of charitable donations, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801-02 (1988); publishing governmental information, *New York Times Co. v. United States*, 403 U.S. 713, 723 (1971); performance of theatrical productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553-54 (1975); commercial sales of sexually explicit goods, *Vance v . Universal Amusement Co., Inc.*, 445 U.S. 308, 312 (1980); and broadcasting investigative reports, *CBS, Inc. v Davis*, 510 U.S. 1315, 1316-17 (1994).

In Chicago one cannot hold a rally in a public park involving more than fifty people, or any number of people using amplified sound, without first obtaining government permission. In *Southeastern Promotions, Ltd. v. Conrad, supra*, this Court said a provision which gives "public officials the power to deny use of a forum in advance of actual expression" is a prior restraint. 420 U.S. at 553. The Chicago Park District ordinance certainly meets that definition. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) this Court reiterated that holding, describing an ordinance requiring a permit and fee before public speech, parades or assemblies in

a traditional public forum as a prior restraint.

This Court has repeatedly stated that any scheme whereby one must obtain a license to engage in free speech is a prior restraint. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 802 (1988); *Healy v. James*, 408 U.S. 169, 184 (1972). Such an ordinance comes to any court carrying very heavy baggage. It is presumed to be unconstitutional, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The government bears a heavy burden to overcome that presumption and justify any such restriction. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Ignoring this background of constitutional hostility to government efforts to interfere with political speech in public fora, the Seventh Circuit brushed aside decades of decisions that have served the cause of liberty and freedom well. Citing no authority, the Court turned First Amendment jurisprudence upside down, holding that since the ordinance did not expressly authorize the General Superintendent to engage in overt censorship, it was a time, place and manner regulation, not a prior restraint. Such a view ignores the political history of this country, and the reasons for the very existence of the First Amendment.

E. Not analyzing a permit requirement as a prior restraint places an intolerable burden on permit applicants.

The Seventh Circuit's formulation places a crushing burden on the average citizen who is denied the right to engage in political speech in a public park by an incorrect (or intentionally hostile or dishonest) denial of a permit. He is denied participation in making a record for a common-law certiorari review of the suppression of his proposed utterances. Confined to a meager, or non-existent record, he must overcome the presumption that the administrative agency was correct in denying his permit. And he must either do so *pro se*, while the agency is represented by government-paid counsel, or quickly find and retain counsel willing to engage in an emergency appeal. His other alternative is to find counsel to bring suit in the federal courts, where, if he is in the Seventh Circuit, he must not only commence the suit, but must also prove that the government's denial of his application for a permit was based upon hostility to him or his message-even though the government may have carefully avoided making any such damaging admission, using such vague reasons as an incomplete or incorrect application.

These hurdles are daunting, if not insurmountable. We will never know how many have been wrongly dissuaded by a simple denial from the Park District, because the Park District has refused to make that information available. We know that it takes a massive battle by courageous citizens to overcome these obstacles. That must end. If there be hurdles, it must be the Park District's task to overcome them to deny speech, not the other way around. Whatever the reason or the context, the government must always be required to bear the particularly heavy burden of justifying every act which results in prohibiting speech in a public forum. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

F. The Seventh Circuit is alone in deciding that a permit scheme restricting core political speech in a public forum is not a prior restraint

Two other circuits have spoken on this issue recently. The Second Circuit, in *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999), and the Eleventh Circuit, in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), both held that ordinances requiring permits for political speech in public parks are prior restraints.

In *Beal*, the Second Circuit reversed a trial court's holding that New York City's park permit ordinance was a time, place and manner regulation. The court recognized that conditioning the exercise of expressive activity on official permission constitutes a prior restraint on speech by giving "public officials the power to deny use of a forum in advance of actual expression." 184 F.3d at 124. The court explicitly recognized, as has this Court on numerous occasions, that a regulation may constitute a prior restraint even if it is not content-based. *Id.* The Eleventh Circuit, in *Cannabis Action Network*, reached the identical conclusion. 231 F.3d at 768.

The holdings of the Second and Eleventh Circuits are correct, and consistent with this Court's decisions. The Seventh Circuit must not be allowed to ignore settled law. The Seventh Circuit must be reminded that it cannot so simply allow the government to trample upon our most precious constitutional rights.

II. AS A PRIOR RESTRAINT, THE ORDINANCE CAN BE CHALLENGED ON ITS FACE.

The Seventh Circuit would require every unsuccessful applicant for a permit to speak to prove that the reason for the denial was the Park District's desire to suppress the content of their speech. Recognizing the "competing interests" for use of public parks, the panel cautioned lower courts in the Circuit against ruling on facial challenges, which it called decision-making "in the abstract," and stated:"[T]his must give pause to any court minded to strike down a permit regulation on its face and so without consideration of its application to a particular event for which a permit was denied." (Pet. 4a).

The idea that a challenge to an ordinance restricting free speech may only be made once it has been shown that a permit has been denied for an impermissible reason–flies in the face of the First Amendment and this Court's decisions. It makes judicial review of a permit denial meaningless.

This Court specifically rejected the concept that one's speech could be conditioned upon the speaker obtaining prior judicial approval before being allowed to communicate his ideas in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). Whatever the reason, the government must bear the particularly heavy burden of justifying every action which results in prohibiting speech in a public forum. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The proposition that any scheme which requires the government to be consulted and give its assent before one may speak publicly is a prior restraint applies to any and every kind of speech, whether it be a newspaper, handbill distributed by hand, solicitation for money, theatrical performance, or a diatribe by one standing on a soap box. Such a scheme can survive only under the strictest of safeguards because any such scheme carries within it the dangers of censorship. *Blount v. Rizzi*, 400

U.S. 410, 419-21 (1971); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968).

A. The ordinance contains so much discretion that a facial challenge is the only meaningful vehicle for judicial review.

In *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 755-56 (1988), this Court reaffirmed the principle that facial challenges can be brought against ordinances that contain unlawful discretion without even subjecting oneself to their procedures, because the dangers posed by the very existence of these ordinances are so serious they require immediate consideration by the federal courts. This Court has long recognized the difficulty of effectively detecting, reviewing and correcting content-based censorship "as applied" without standards by which to measure the licensor's actions. It is because statutes like the Code in this case pose a serious risk of clandestine censorship that courts must entertain immediate facial attacks on such schemes. *Id.* at 759.

The Seventh Circuit concluded that the Park District ordinance poses no real danger to freedom because it contains only a little discretion.[25] This is in stark contrast to the opinion of Magistrate Judge Keys, who wrote:

> [T]he plain language of [subsection C(5)(e) of the ordinance] fails to provide any neutral criteria to guide the Park District's: determination of what conduct constitutes a material misrepresentation, a

25. The Seventh Circuit is as critical of facial challenges as it is of the prior restraint doctrine: "All [Petitioners'] contention regarding the vagueness of 'material misrepresentation' shows is the limits of language and so the inherent limitations of 'facial challenges.' " (Pet. 5a).

> violation of a prior permit, a material falsehood on an application, or damage to Park District property on a prior occasion (collectively referred to herein as "alleged misconduct"); decision as to who was responsible for the alleged misconduct; and decision as to which applications (where misconduct has been found) should be permitted anyway.
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> Similarly, there are no neutral criteria in the Ordinance for what type of evidence is required to prove alleged misconduct, or even an indication that any proof is necessary. Further, it is not clear who at the Park District is designated to make these determinations – it appears that any Park District employee could make a notation in a file that a prior permittee violated some provision of the Ordinance. Most troubling, however, is the omission of any limit regarding how long an instance of alleged misconduct can cause an individual to be barred from obtaining a permit. The Ordinance provides no maximum penalty. Thus, it appears that the Park District could choose to exercise its discretion to prevent someone from ever getting a permit again. This subjective determination could be even more invidious due to the fact that permit seekers whose audiences have caused prior permit violations (resulting in alleged misconduct vis-a-vis the permittee) are likely those whose speech generates the

most public outcry.

(Pet. 64a-65a) (footnote omitted; emphasis in original).

Magistrate Judge Keys was right. Vagueness permeates the entire ordinance, a vice this Court has repeatedly found subject to facial attack. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). Facial challenges are allowed in order to protect the rights of all society. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). They may not be swept away as cavalierly as the Seventh Circuit attempts to do. Only by allowing the courts to swiftly review, by way of facial challenges, the text of governmental schemes which by their very existence discourage citizens from standing up to be heard, will the First Amendment remain strong and true to its purpose. If we allow every case challenging government interference with citizen speech to become bogged down in exploring the inner workings of bureaucratic minds, to determine "why" they denied permission to speak, we allow the government a right of filibuster which will make the First Amendment a dead letter, devoid of any teeth to enforce its guarantees. Every attempt to interfere with free political speech in traditional public fora must be repelled in the most decisive, speedy and forceful manner possible. Facial challenges must remain as our first bulwark against governmental interference with speech, for whatever reason and under whatever guise.

B. The Seventh Circuit acknowledged that the ordinance gave the Park District unfettered discretion.

The Seventh Circuit agreed with Petitioners that the ordinance contains a grant of standardless discretion that poses the very danger of censorship that this Court has routinely condemned. The ordinance lists numerous grounds for denial of a permit. However, denial is completely discretionary. As

Petitioners argued, as Magistrate Judge Keys expressly found, and as the Seventh Circuit reluctantly recognized,[26] this provision would allow the General Superintendent to forgive previous permit violations of groups with a message he (or his political allies) favored, while using prior violations as an excuse for banning speech he found not to his liking.

Incredibly, the Seventh Circuit said this discretion was good! According to the panel, if the permissive word "may" were replaced by the mandatory word "shall," thus requiring the General Superintendent to visit the identical consequences on all wrongdoers, regardless of the content of their message, the ordinance would be "more restrictive" of free speech. The Circuit Court found it desirable that the General Superintendent has the power to give new permits to his friends who violated the rules in the past, while denying permits to those with whom he disagrees who violated the same rules. This is an untenable proposition, allowing *sub rosa* censorship, the very reason for allowing facial challenges. This Court must once more condemn such slavish pandering to governmental misuse of power.[27]

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26. "The plaintiffs argue that this power of mercy arms the park district to pick and choose among applicants on political grounds. *It indeed creates such a danger . . . .*" (Pet. at 6a) (emphasis added).

27. The practical effect of removing the discretion here would be that the Park District would have to eliminate this provision altogether. The Park District could not "stand the political heat" if it had to deny permits to large, public service groups with popular messages but with prior permit violations.

III. PROMPT ACCESS TO THE COURTS FOLLOWING DENIAL OF A PERMIT APPLICATION IS MEANINGLESS WITHOUT A REQUIREMENT FOR A PROMPT JUDICIAL DECISION.

Once the Court determines that an ordinance is a prior restraint, and is subject to a facial challenge, it must resolve the critical issue of which of the procedural safeguards mandated by *Freedman v. Maryland* must accompany such an ordinance. And in reaching its decision, the Court will resolve the conflict that has perplexed and divided the circuits: what is meant by the phrase "prompt judicial review?"

A. The decision in *Freedman v. Maryland* contemplated swift judicial action to protect speech from unlawful prior restraints.

In *Freedman*, the Court never suggested that mere access to the courts satisfied the need for prompt judicial review:

> [B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid prior restraint . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film . . . [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59.

In *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968), the court said that a licensing procedure "must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

This Court has never held that mere access to the courts was sufficient. That proposition came from the Seventh Circuit's plurality opinion in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993)(en banc), *cert. denied*, 511 U.S. 1085 (1994), where the Court asserted repeatedly it was not dealing with a First amendment issue.

B. *FW/PBS* did not limit *Freedman*'s requirement for prompt judicial review.

In *Graff*, five judges decided that this Court had eliminated the need for a prompt judicial decision, by referring to the plurality opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).[28] Specifically, the *Graff* opinion referenced the following language from *FW/PBS*: "[T]here must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Graff*, 9 F.3d at 1324 (citing *FW/PBS, Inc.*, 493 U.S. at 228).

As the Seventh Circuit noted in this case, *Graff* was decided by a "badly fractured" court, and resulted in a plurality opinion of five judges. (Pet. 8a). *Graff* provided the underpinning for each of the Seventh Circuit's decisions in this case, as well as the judgment of the district court. But the dictum in *Graff* about the applicability of *Freedman*'s procedural safeguards is just plain wrong, and must be

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28. The plurality in *Graff* included each of the judges comprising the panel in this case.

expressly repudiated.

This Court in *FW/PBS* did not intend the result reached by the *Graff* plurality. The Seventh Circuit's conclusion was correctly rejected in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998):

> The meaning of "prompt judicial review" in the context of adult business licensing schemes has been considered by five circuits since the Court rendered its plurality decision in *FW/PBS*. The Fifth and Seventh Circuits have held that prompt access to judicial review is sufficient, even if there is no time frame for a hearing or a decision on the merits. *See TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 709 (5th Cir.1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993)(en banc). The Fourth and Sixth Circuits have held that prompt judicial review requires a prompt decision on the merits. *See 11126 Baltimore v. Prince George's County, Md.*, 58 F.3d 988 (4th Cir. 1995)(en banc); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995). The Eleventh Circuit rejects the view that mere access to judicial review is sufficient, but has not said what more is required to satisfy the prompt judicial review standard. *See Redner v. Dean*, 29 F.3d 1495, 1501-02 (11th Cir.1994).
>
> We reject the view of the Fifth and Seventh Circuits that mere access to judicial review is sufficient. As the Seventh Circuit acknowledged in *Graff*, "[a] person always has a judicial forum when his speech is allegedly infringed." *Graff*, 9 F.3d at 1324. Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.
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> The phrase "judicial review" compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless.

154 F.3d at 1101-02.

Prompt judicial review must include a requirement for a prompt decision. The survival of political speech contrary to the government's position depends on it.

IV. THE GOVERNMENT MUST BEAR THE BURDEN OF INITIATING JUDICIAL REVIEW, AND THE BURDEN OF PROOF IN COURT, WHEN IT DENIES ITS CITIZENS THE RIGHT TO ENGAGE IN POLITICAL SPEECH IN A PUBLIC FORUM.

One of our oldest adages is "you can't fight City Hall." While this is not always true in our American democracy, there is no question that government decision-makers have an enormous advantage over citizens in terms of authority and resources. The government has the raw power to require permits in order to participate in public political speech. That authority is backed by the police power, including such coercive measures as arrest and fines. Government also has access to the public coffers as well as the expertise of staff attorneys, allowing it to use funds taken from the citizens to

suppress their rights. In contrast, the citizen has only the power of his own voice and the persuasiveness of his ideas.

A. **It is the government's burden to initiate judicial review when it denies a permit.**

Traditionally the Courts have provided the final bulwark against government oppression (whether intentional or the result of bureaucratic incompetence). This Court has long recognized the need for judicial review of licensing decisions affecting free speech rights:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.

Freedman, 380 U.S. at 58.

The problem for citizens is getting to that fair hearing where resources are limited and the obstacles are often overwhelming. In *Freedman*, this Court unequivocally placed the burden on the government to justify denials of permits where free speech interests are at stake:

> First, the burden of proving that the film is unprotected expression must rest on the censor . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.

Id. at 58-59.

The requirement that government initiate litigation ensures that judicial review will occur even when the applicant lacks the funds to pursue the court battle himself. In order to sustain a permitting decision, the government will be required at a minimum to make a prima facie case supporting the denial of speech.[29] Under this arrangement, arbitrary or content-based decision-making will not pass judicial review even if the applicant cannot afford an attorney to champion his cause.

Government--in this case the Park District--routinely claims that it no longer bears the burden of initiating judicial review when it denies a license for free speech activities. That position was sustained by the Seventh Circuit below, although other courts have criticized the rationale underlying that decision. The Seventh Circuit's argument is based exclusively on the plurality opinion in *FW/PBS, Inc.* However, that position is neither an accurate statement of the law nor desirable policy.

In *FW/PBS*, after having found that the Dallas adult business licensing law was an unconstitutional prior restraint the plurality opinion said that requiring the government to institute review of a permit denial was not necessary in the context of adult businesses. Three other Justices would have continued the requirement that government initiate review of permitting decisions. The remaining Justices would have found the law constitutional under a variety of theories, but none wanted to retreat from *Freedman*. Nothing in that decision

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29. The imposition of the burden of proof on government was not an invention of the *Freedman* Court, but arose from precedent established long before that decision. *Freedman* itself relied on eloquent language found in *Speiser v. Randall*, 357 U.S. 513, 526 (1958): "Where the transcendent value of speech is involved, due process certainly requires ... that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."

supports the proposition that a potential political speaker, frustrated by the government, must initiate suit to vindicate the right to publicly air political views.

The circumstances facing political activists bear little resemblance to those governing sexually oriented businesses. Prompt judicial disposition is imperative to preserve the rights of political activists faced with a prior restraint on speech. Judicial review is no comfort to the permit applicant if the date for his parade has passed, the election is over, or the particular "hot button" political issue is now cold and stale.

Contrary to the Seventh Circuit panel's position(Pet. 11a-12a), political speech is entitled to *at least* the same protection as the fare offered by sexually oriented businesses. Indeed, that was the basis for the Eleventh Circuit's decision in the nearly identical factual situation in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000).[30] In that case, political activists challenged a permit ordinance, and the Eleventh Circuit found it unconstitutional. The City had argued that *FW/PBS* eliminated the requirement that the government must initiate judicial review. The Eleventh Circuit disagreed, finding that precedent and policy demanded the continuation of that constitutional protection for political speech in a public forum:

> The argument for relaxing the procedural safeguards is not as strong in this case as it was in *FW/PBS*. As we recognized in *Boss Capital*, the pre-*FW/PBS* cases predominantly involved censorship, and *FW/PBS* was the first case to confront a licensing ordinance for adult entertainment

30. The City of Gainesville filed a Petition for Writ of Certiorari which is pending in this Court. (No. 00-1503).

establishments. *See* 187 F.3d at 1256. In *FW/PBS*, only a plurality of the Court was willing to relax *Freedman*'s third procedural safeguard in the less protected context of a sexually oriented licensing scheme. *See* 493 U.S. at 228, 110 S.Ct. at 606. In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum. Thus, once again, "[w]e believe this is a situation for 'treating unlike things differently according to their differences.'" *Boss Capital*, 187 F.3d at 1256 (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999)). The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet Freedman's first procedural safeguard. (footnote omitted).

Cannabis Action Network, Inc., 231 F.3d at 775-76. (footnote omitted).

The Eleventh Circuit's well-reasoned decision in *CAN* should be contrasted with the limited analysis engaged in by the Seventh Circuit in the instant case, confined to a single paragraph:

> The plaintiffs argue that the park district should in every case in which it denies a permit be required to seek judicial review of its own action. The argument is based

> on a misreading of *Freedman v. Maryland, supra*, 380 U.S. at 58-59, 85 S.Ct. 734, which holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems. The Supreme Court made that clear in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228- 230, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion), *id.* at 244, 110 S.Ct. 596 (concurring opinion), *id.* at 249, 110 S.Ct. 596 (concurring and dissenting opinion).

(Pet. 9a).

The fundamental flaw in the Seventh Circuit opinion is, of course, the notion that content neutral licensing systems are somehow exempt from prior restraint analysis. There is no question that the licensing ordinance at issue in *FW/PBS*, was completely content neutral. However, the fact that the law did not discriminate on the basis of content did not save it from being declared an unconstitutional prior restraint by this Court.

Government frequently argues that it is burdensome and costly to impose the *Freedman* litigation requirement on local authorities. Such claims are sometimes accompanied by "Chicken Little" predictions of public disorder and general mayhem. However, the record in this case is devoid of any suggestion that the Park District was flooded with applications or that it had cause to deny many of them. In contrast, the deleterious effect of a permit denial on an activist's free speech rights is undeniable. *Elrod v. Burns*, 427 U.S. 347 (1976).

Unless the government is required to institute legal action, as contemplated by *Freedman*, all the other rights secured by the First Amendment are likely to fall by the

wayside. As stated by the Seventh Circuit, actually following *Freedman* in an earlier Park District case:

> We are hesitant to impose on municipalities the necessity of resorting to court injunctive procedure every time it is decided that a permit for use of public property should properly be denied. Nevertheless, in the sensitive area of prior restraint of freedom of expression this is a necessary due process procedure.

Collin v. Chicago Park District, 460 F.2d 746, 756 (7th Cir. 1972).[31]

B. The government must also bear the burden of proof in the judicial review proceeding.

In addition to seeking judicial review, the Park District must also be required to bear the burden of proof, if the mandate of *Freedman v. Maryland* is to survive. Otherwise, only money and access to competent counsel, not the protection of the First Amendment, will protect political speakers from government censorship.

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31. One of the most distressing aspects of the Court of Appeal's decision in this case is the fact that the panel completely ignored *Collin*, a prior decision that did recognize the First Amendment rights of citizens to be heard in the public parks and streets. Although Petitioners repeatedly relied upon the decision in *Collin*, (as did the Magistrate Judge), the panel apparently overruled it *sub silentio*.

However, assigning responsibility for the burden of proof is probably redundant. The plaintiff in every litigation has the burden of proof. When injunctive relief is sought, the plaintiff has a heavy burden because injunctive relief is an extraordinary remedy not to be issued lightly. It is an extraordinary remedy reserved for extraordinary causes. *Ex parte Collett*, 337 U.S. 55, 72 (1949). Therefore, so long as the Court properly visits the burden of initiating judicial review on the government when a permit is denied for core political speech, the burden of proof will follow automatically.

Of course, as we have discussed earlier, this Court has always required the government to bear the burden of justifying any restrictions on speech, particularly in public fora. The government may not transfer this burden to a potential speaker by requiring a permit before one can be heard in a public place. If the First Amendment is to retain its meaning, the onus of justifying any prohibition of any citizen from being heard must remain on the would-be suppressor, regardless of the asserted reason, or the situation in which the prohibition is sought.

V. IN ADDITION TO FOLLOWING THE MANDATE IN *FREEDMAN v. MARYLAND*, THE GOVERNMENT MUST AVOID UNDUE DISCRETION WHEN IT REQUIRES A PERMIT TO ENGAGE IN CORE POLITICAL SPEECH IN A PUBLIC FORUM.

The permit procedure ordinance upheld by the Seventh Circuit in this case contains so much discretion that the General Superintendent can deny virtually any permit application and force the applicant to protracted and expensive litigation to secure the right to be heard. Such a scheme threatens core political speech to an extent that cannot be tolerated.

A. There is a long judicial history of enmity towards discretion in free speech permit cases.

This Court, in *FW/PBS*, spoke of what it called the "evil" of discretion:

> Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). *See Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham, supra; Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). " 'It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' " *Shuttlesworth, supra*, 394 U.S., at 151

(quoting *Staub, supra,* 355 U.S., at 322).

493 U.S. at 225-26.

In spite of this clear language, and the plethora of cases striking down such ordinances because of too much discretion, the Seventh Circuit has chosen to strike out in a different, and constitutionally invalid, direction.

B. **The Seventh Circuit has relaxed the prohibition against unbridled discretion, threatening to emasculate core political speech.**

The district court, relying solely on the Seventh Circuit's opinion in *Graff*, found the standards of the ordinance regulating issuance and denial of permits specific enough to withstand constitutional scrutiny. (Pet. 84a-85a)[32] The district court observed that "[w]hile . . . section C(5)(e) contains some ambiguities and places a certain modicum of discretion with Park District officials, "[n]ot all discretionary decisions implicate the First Amendment." *Graff*, 9 F.3d at 1319 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993)). (Pet. 85a).

The Seventh Circuit panel followed suit, finding the discretion in the ordinance acceptable. An example of why the district court and the Seventh Circuit panel were wrong is found in the panel's determination that the phrase "the Park District may deny an application for permit" does not create unlawful discretion. The panel wrote:

> [The Plaintiffs] complain that the grounds for denial of a permit are permissive. The park district "may" deny a permit because of a misrepresentation, the failure to tender the fee, having damaged the property of the park district on a previous occasion, or other grounds listed in the regulation, but it is not required to; it can forgive. The plaintiffs argue that this power of mercy arms the park district to pick and choose among applicants on political grounds. It indeed creates such a danger; but if this discretionary feature of the regulation were excised, the regulation would be more restrictive than it is . . . .

(Pet. 6a).

32. Of course, as a restriction on political speech, the ordinance must withstand the most exacting scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Actually, the panel has made the ordinance sound better than it is. The ordinance allows a permit to be denied for a variety of reasons, most of which would allow an unlawful denial to masquerade as a valid rejection.

The Park District ordinance allows the following to occur: John Speaker obtains a permit for a political rally in support of a position strongly opposed by the mayor, or the Park District, or its General Superintendent, or other powerful bureaucrat or campaign contributor with influence at City Hall. He holds his rally, a large crowd attends, and emotions run high. Fights occur. Shrubbery is damaged. People remain in the park long after the event, drinking and being rowdy. Mr. Speaker, who has no authority whatsoever to control these events or to remove anyone from a public park, concludes his event and leaves the park within his allotted time. He breaks no law, causes no damage and sanctions no improper behavior.

Sometime later, Mr. Speaker applies for another permit, for a similar rally. The General Superintendent can use a

number of provisions to deny him a permit. He will be silenced, not for *his* actions but for the unlawful actions of others over whom he has no control, and indeed, who may be strongly opposed to his message. This scenario is not fanciful or imagined; this is *precisely* what happened to Robert MacDonald. It cannot be allowed to happen again.

CONCLUSION

Freedom of speech is one of our most fragile rights, vulnerable to gravely damaging yet barely visible encroachments. *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. at 66. It must be ringed with adequate bulwarks, the most rigorous procedural safeguards. *Marcus v. Search Warrant*, 367 U.S. 717, 730--31 (1961). It may be restrained in only a few narrowly circumscribed circumstances, and only under strict judicial supervision. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957). The separation of legitimate from illegitimate speech requires sensitive tools. *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

Petitioners have attempted to engage in core political speech. Contrary to the belief of the court below, the right of Petitioners to utter that speech, and the rights of others to hear their message, is more important than maintaining the recreational aspects of the public parks. Contrary to the thesis upon which the panel's opinion is based, whether the Park District is protecting the grass and flowers, or engaging in a clandestine attempt to suppress speech with which it disagrees, is of no moment. It can have no legitimate reason to suppress or stifle free speech. As this Court has repeatedly recognized, placing any barriers in the way of the expression of such speech has the potential to chill its exercise. The cavalier comment by the Court of Appeals that all one need do to vindicate the right to speak in a park is to sue a large metropolitan government in state court, and also file a second suit in federal court, if

necessary, is disingenuous. (Pet. 10a). Being required to make "a federal case out of it," by itself, may be more than enough to convince all but the most committed to give up the effort to pronounce their views publicly as being not worth it. Requiring them to bear the burden of proof that the denial is based upon an active dislike of their potential message not only turns the First Amendment on its head, it goes a long way in guaranteeing that the government will succeed in its attempts to suppress dissent. This court must declare in the most forceful and unmistakable terms that placing these kinds of road blocks in the path of the citizenry will not be countenanced.

Respectfully submitted,

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